Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-2009

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

DEL MONTE CORPORATION, a New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delavare corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioner,

v.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Court of Appeals correctly hold that an employer's flagrant violation and total disregard of ERISA's reporting, disclosure and claims procedure provisions are probative as to whether the employer's decision to deny benefits provided for under an ERISA plan is arbitrary or capricious?

(2) Where an ERISA plan provides for severance pay when the employee's position is "eliminated" *and* alternative employment opportunities are unavailable *"within the corporation,"* can an employee who loses his position within the corporation as a result of the sale of the subsidiary he works for be denied severance pay based on the employer's secret intent, not expressed in the plan, to benefit only unemployed workers, if the employer has concealed the plan and deliberately failed to comply with any provision of ERISA?

(3) Did the Court of Appeals correctly hold that, in the circumstances outlined above, an administrator of an ERISA plan cannot restrict an employee's right to receive benefits by imposing eligibility conditions which are neither required by the terms of the plan nor disclosed to the employee?

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STATEMENT OF THE CASE

A. Introduction

Petitioners seek Supreme Court review on the ground that the Ninth Circuit Court of Appeals has created an unwarranted remedy for a mere procedural violation of ERISA. This argument, however, masks the true nature of both petitioners' illegal conduct and the Ninth Circuit's opinion. Del Monte Corporation did not, as petitioners suggest, simply commit "a" procedural

violation of ERISA[1]; it *completely ignored* each and every requirement imposed by ERISA and *intentionally concealed* the terms of the plan. On the issue of Del Monte's concealment and noncompliance, there is no contradiction in the record nor any dispute by petitioners. Under these circumstances, the Ninth Circuit held that the ambit of the administrator's discretion to interpret the plan under the arbitrary and capricious test must be circumscribed by the language of the plan itself and cannot be based on a secret purpose allegedly underlying the plan, not specified in and, indeed, contrary to its express provisions.

The particular severance plan at issue in this case does not postulate total unemployment as a condition to eligibility; on the contrary, it explicitly provides for severance benefits where an employee's position is eliminated and alternative employment is unavailable "*within the Corporation.*" (Emphasis added.)[2] Accordingly, the Ninth Circuit held that by reason of Del Monte's total disregard of all ERISA requirements, it could not interject an additional and contrary condition—the unavailability of a position with *any employer*—either by reference to its secret interpretation of the plan to that effect, or to its undisclosed practices at other subsidiaries allegedly based on that secret interpretation.

In the courts below, respondents urged that given the total disregard of ERISA and intentional concealment presented here, the deferential arbitrary and capricious test should not apply at all. The Ninth Circuit did not go that far. But to recede further from its decision, as petitioners ask of this Court, would emasculate ERISA and make a mockery of the underlying congressional

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[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq., commonly referred to as "ERISA".

[2] The conditions of entitlement are consistent with a well-recognized purpose of such plans—to reward past services. *Petrella v. NL Industries*, 529 F. Supp. 1357, 1362 (D.N.J. 1982); *Dulany Foods, Inc. v. Ayers, Va.*, 260 S.E.2d 196, 202 (1979); *Dahl v. Brunswick Corporation*, 277 Md. 471, 356 A.2d 221, 226 (1976); *Chapin v. Fairchild Camera Etc. Corp.*, 31 Cal. App. 3d 192, 198-199, 107 Cal. Rptr. 111, 116 (1973).

intent, rewarding flagrant violations of the statute's reporting and disclosure provisions by allowing the employer the same full and unfettered discretion to "interpret" a secret plan by imposing additional conditions to eligibility (as long as such conditions were in some abstract sense "reasonable") as if the employer had fully and in good faith disclosed those conditions in compliance with ERISA.

At any rate, the Ninth Circuit's opinion, which interprets the wording of a *specific* benefit plan adopted by *one* company and addresses the novel situation in which "virtually every applicable mandate of ERISA" was violated, does not conflict with any decision of any other court. The *Blau* decision imposes no hardship on employers and, consistent with the settled law in the other circuits, fully preserves their rights under ERISA to reasonably interpret severance plans and to grant severance benefits under whatever conditions they see fit (including unemployment), *so long as* those interpretations and conditions are disclosed to the employees in compliance with ERISA. Del Monte proffers no excuse for its failure to even *attempt* to comply with ERISA and is not entitled to the time and sympathy of this Court, as if it were one of those blameless employers who, because "ERISA is a relatively complex piece of litigation [sic] with rapidly changing case law and regulations . . . [,] have not fully complied with its procedural provisions." (Petition, p. 5.)

B. Statement of Facts

1. Respondents' Claim for Severance Benefits

Respondents are a class of former salaried non-union employees of a Del Monte subsidiary previously known as Granny Goose Foods, Inc.[3] Effective December 13, 1980, Del Monte sold all of the subsidiary's assets to a corporation then known as Potato

[3] Citations herein to the record in the court below are to the excerpt of record (ER) and to various documents not contained in the excerpt of record which were transmitted to the Court of Appeals from the District Court. The opinion petitioners seek review of is printed in Appendix C of the Petition at pages A-20-35 and is cited in the format: Petition, p. A- .

Chips, Inc. (ER-453.)[4] As a consequence, respondents' employment by any Del Monte company was involuntarily terminated and their positions with any Del Monte company were eliminated. (Declaration of Lynne M. Jensen in Opposition to Defendants' Motion for Partial Summary Judgment, ¶ 1.) Respondents therefore sued to recover severance benefits pursuant to the uniform practice of Del Monte and Snacks of granting such benefits to every salaried non-union employee of Snacks who was involuntarily terminated in the eight years prior to the sale, regardless of whether the employee was thereafter unemployed. (ER-562.) After the instant action was commenced, respondents first discovered that Del Monte had a secret written "Separation Allowance Policy." (ER-563.)[5] Respondents claim that they are entitled to severance benefits under its terms.

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[4] Subsequent to this sale, the former Granny Goose Foods, Inc., *i.e.*, the seller corporation, changed its name to Del Monte Snacks, Inc. and Potato Chips, Inc., the buyer corporation, changed its name to Granny Goose Foods, Inc. (ER-3.) To avoid confusion between the two Granny Geese, throughout this brief respondents refer to the selling Del Monte subsidiary as Snacks and refer to the purchasing corporation as Potato Chips, Inc. Respondents are sometimes referred to as former employees of Snacks. The subject sale is referred to as the sale of Granny Goose.

[5] The manner in which the "Separation Allowance Policy" first surfaced is indicative of petitioners' credibility. Early in the case, petitioners moved to dismiss respondents' common law causes of action for severance benefits on the ground that they were preempted because Del Monte's severance plan was an ERISA plan. Petitioners, however, failed to attach the relevant plan to their moving papers or even mention that it existed. (*See* Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment and Declaration of James W. Farlow in Support thereof.) Instead, they attached a completely different plan—the Del Monte Retirement Plan. (*See* Exhibit A to Declaration of James W. Farlow.) When respondents protested that no plan should be ruled an ERISA plan until its terms were known, the "Separation Allowance Policy" appeared in public for the first time, accompanying petitioners' *reply* brief. (*See* Exhibit A to Further Declaration of James W. Farlow.) Petitioners' willingness to mislead not only their employees, but the courts, was thus evident from the outset of the litigation.

2. The Sale of Granny Goose

The decision to sell Granny Goose was part of a corporate reorganization of both Del Monte and its parent corporation, R. J. Reynolds. (ER-519-525.) Snacks' employees learned of the impending sale through newpaper accounts. (ER-563-564.) With four exceptions, none of them were offered the option of continued employment with Del Monte or any of its related companies after the sale. (ER-182-183.) As a result of the sale, respondents therefore lost their eligibility for the package of benefits provided by Del Monte to employees of its subsidiaries. (ER-454; Deposition of James Howell, p. 107.)[6] Moreover, respondents were never promised or guaranteed any employment with Potato Chips. (ER-526-534, 564.) The employees reported to the new employer without knowing whether they would be retained or what benefits they might receive. (ER-409-411.) Ultimately, Potato Chips did offer employment, albeit at significantly reduced benefits and job security. (ER-485, 565.)

3. The Severance Plan

The Del Monte "Separation Allowance Policy" is the only written document defining the terms and conditions of Del Monte's ERISA plan to provide severance benefits. (ER-235.)[7] The circumstances in which an employee is entitled to receive severance pay are set forth under two headings on a single page. The first heading, "Objective," provides:

> "This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for employees whose *positions are eliminated* as a result of reorganization, consolidation, or elimination of operations to which they have been assigned *and* for whom appropriate alternative employment opportunities *are un-*

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[6] Respondents did not lose the right to receive pension benefits which had already vested but, of course, could no longer accrue credited service under the pension plan. (ER-139, 212, 295-296, 478-479.)

[7] The text of the policy is included in the lower court's opinion. (*See* Petition, pp. A-21-23.)

available within the Corporation." (Petition, p. A-21, emphasis added.)

The second heading, "Eligibility," establishes only three exclusions: "employees subject to union negotiated termination allowance programs," "employees who have been discharged for cause" or "employees who have refused transfer to suitable positions . . . offered to them *by the Corporation*" are not entitled to severance pay. (Petition, pp. A-21-22; emphasis added.) Nothing in the policy indicates subsequent employment *outside* of Del Monte restricts the right to receive severance pay, nor is there any indication that the policy's purpose is to provide a form of unemployment compensation. (Petition, pp. A-29-30.) Further, there is no provision relating to terminations caused by sales of subsidiaries as a special case. (ER-296-297.)

4. Del Monte's Administration of the Severance Plan

Del Monte's administration of the severance plan was "riddled with illegality." (Petition, p. A-35.) Indeed, "[t]he undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA." (Petition, p. A-27.) The "Separation Allowance Policy" shows on its face that it was kept secret in violation of ERISA's reporting and disclosure provisions. (Petition, p. A-27, citing 29 U.S.C. §§ 1021-1031.)[8] Accordingly, it was never distributed to the employees, nor were they ever given any kind of written or oral summary or explanation of the plan's terms. (ER-563.) Specifically, no explanation of the application of the policy in the event a subsidiary was sold was provided and Del Monte's past practices in such transactions were never disclosed. (ER-563-564.)

Del Monte's severance plan was also deficient in other significant respects. In violation of ERISA, the policy names neither

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[8] The policy's heading states:

"CONFIDENTIAL (DISTRIBUTION *ONLY* TO CORPORATE OFFICERS AND CORPORATE EMPLOYEE RELATIONS STAFF MANAGERS)" (Original emphasis.)

Thus, not even the President of Snacks would have received a copy. (ER-373.)

trustees nor fiduciaries and fails to designate any plan administrator. (ER-315, 322-323; *see* 29 U.S.C. §§ 1022 and 1103.) Moreover, Del Monte completely ignored ERISA's mandate to establish a reasonable claims procedure for benefit determinations and failed to create any claims procedure *whatsoever*. (ER-315; Petition, p. A-27, citing 29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1(b)(1).)

Although Del Monte has attempted to divert the courts' attention from its flagrant violations of ERISA and play down their effect, its utter failure to comply with the reporting, disclosure and claims procedure requirements has never been contested nor has any excuse or explanation ever been presented. James Howell, Del Monte's ERISA compliance expert, simply claimed that the "Separation Allowance Policy" was the one exception to his responsibility. (ER-302-303.)

5. Respondents' Understanding of the Severance Plan

Because the "Separation Allowance Policy" was never distributed, respondents' understanding of the policy was based on their knowledge, obtained by word of mouth from fellow employees, that Del Monte granted severance pay to all involuntarily terminated employees of Snacks. (ER-394-395, 398, 404, 459-467, 562.) Based on their understanding, respondents fully expected that they would receive a separation allowance, both before and after they learned of the sale. (ER-387-388, 476-477, 564.) Respondents viewed severance benefits as a form of compensation for past services (ER-426) and Del Monte has also characterized them as such. (ER-510-511.) Further, Del Monte's practice directly influenced respondents to remain in Snack's employ rather than seek other employment. (ER-398-399, 474.) Prior to the sale, respondents were unaware that Del Monte had not granted severance pay to employees of subsidiaries it had previously sold. (ER-563-564.)

6. Del Monte's "Decision" to Deny Severance Benefits

Warren Hageman, then President of Del Monte, made the decision that respondents would not be given severance benefits. (ER-342.) At the time, he had never even seen the "Separation Allowance Policy." (ER-337-338.) Since Del Monte failed to

establish any claims procedure, the decision was made without considering any input respondents would have submitted. (ER-564-565.) After the decision was made, petitioners deliberately refrained from communicating it to the employees. (ER-529-530.) As Mr. Hageman's decision was unwritten, it is, of course, not supported by any contemporaneous reasoning or reference to the purportedly supporting plan provisions. The employees were never given any reason for the decision, except post-hoc, in the context of this litigation. (ER-565.)

C. Proceedings Below

The District Court,[9] after various prior rulings,[10] granted summary judgment for petitioners and held that, as a matter of law, Del Monte's decision to deny severance pay was not arbitrary and capricious. (*See* Petition, Appx. A, pp. A-1-3.) In so ruling, the District Court disregarded the intentional concealment of the plan, the complete violation of ERISA, the lack of any plan provision conditioning the right to severance benefits on unemployment and the plan's clear wording that severance benefits are payable if positions are eliminated and no comparable employment is available within the company, which conditions were both met in respondents' case. The Ninth Circuit, however, would not reward petitioners' violations of ERISA by allowing them to "go judicially unnoticed" (Petition, p. A-32) and reversed.

In essence, the Court of Appeals ruled that where an employer disregards ERISA and conceals the terms of an employee welfare benefit plan, (i) such flagrant illegal action is probative of and, in fact, may in itself be sufficient to establish arbitrary and capricious conduct (Petition, pp. A-10-13) and (ii) under such circumstances, in determining whether an employee is entitled to

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[9] Respondents brought this action in state court and petitioners removed it on the jurisdictional basis provided by ERISA, 29 U.S.C. § 1132(e)(1).

[10] The District Court previously granted partial summary judgment and dismissed all but the sixth cause of action (ER-44), struck respondents' demand for a jury trial (ER-47-51) and granted class certification (Order that Action Be Maintained as Class Action).

benefits under the plan, the employer is bound by its express terms and may not impose eligibility restrictions based on secret interpretations or undisclosed applications of the plan in transactions involving other subsidiaries. (Petition, pp. A-15-17.) Consistent with these principles, the Ninth Circuit also ruled that under the express language of *the particular plan here,* total loss of employment is *not required* in order to be eligible for severance benefits, which are payable if an employee loses his or her position *with Del Monte* and no alternative employment is available *within that company.* (Petition, pp. A-13-15.)

The Court of Appeals found ample support for its decision in the policies underlying ERISA, indeed, finding that "the evils against which ERISA was enacted to guard—insecurity, lack of knowledge, and inability to police plan administration—are just the evils that appear in Del Monte's administration of its plan." (Petition, p. A-32.) Thus, petitioners' claim that its severance plan was actually intended to provide a form of unemployment compensation was not controlling, because "to refer to the secret intent behind a secret plan to determine whether the denial of severance benefits in this case was not arbitrary and capricious . . . would only encourage violation of ERISA's reporting and disclosure requirements . . . " (Petition, pp. A-31-32.)

SUMMARY OF ARGUMENT

For the reasons explained fully below, there is no reason that certiorari should be granted in this case. Contrary to petitioners' assertions, the Ninth Circuit's opinion does not conflict with the decision of any other circuit, because it does *not* hold that "a" procedural violation gives rise to a cause of action under ERISA even where the employee has suffered no economic harm. In fact, the court found that the magnitude of petitioners' violations *did* cause respondents to suffer substantive harm. The record fully supports that finding: respondents, who reasonably viewed severance benefits as compensation for past services, were denied those benefits based on petitioners' interpretation and intent, kept secret in violation of ERISA, that severance pay was meant to be some kind of unemployment benefit.

Nor does the Ninth Circuit's opinion conflict with the decision of any other circuit with respect to the question of whether severance benefits must be paid when a business is sold as a going concern. The instant decision, which interprets a different severance plan with different terms than those construed by other courts, establishes no requirements generally applicable to such sales. Rather, it simply rules that where an employer totally violates ERISA, severance benefits cannot be denied on the grounds that they are conditioned upon unemployment, where that condition is both concealed from the employees and contrary to the terms of the plan. Nothing is novel in that ruling; numerous courts have recognized that to deny employees benefits based on unwritten, undisclosed eligibility requirements is fundamentally unfair and thwarts the core purposes of ERISA.

The intervention of this Court for fear that the wide latitude ERISA affords employers will be disturbed is entirely unnecessary. Employers can continue, under the Ninth Circuit's opinion, to enforce any reasonable interpretation of a benefit plan administered in compliance with ERISA. None of the cases or arguments petitioners present provide any legitimate reason for this Court to extend the statute's protection to employers who, like Del Monte, have deliberately flaunted the protections Congress intended to afford employees. That would be the precise effect of reversing the Ninth Circuit's opinion.

I

THE NINTH CIRCUIT'S DECISION DOES NOT PERMIT EMPLOYEES TO RECOVER BENEFITS TO WHICH THEY WOULD NOT OTHERWISE BE ENTITLED, BUT FOR A PROCEDURAL VIOLATION OF ERISA. TO THE CONTRARY, THE COURT HELD THAT RESPONDENTS ARE ENTITLED TO SEVERANCE BENEFITS UNDER THE TERMS OF THE PLAN. WHAT WAS ARBITRARY AND CAPRICIOUS WAS THE EMPLOYER'S VIOLATION OF ERISA, COUPLED WITH AN ATTEMPT TO INTERJECT A NEW AND CONTRADICTORY CONDITION OF ELIGIBILITY INTO THE CONCEALED PLAN.

Petitioners construe the Court of Appeals' opinion to hold that an employee may sue to recover benefits provided under an ERISA plan based on "a" procedural violation of the statute "*even though the employee would not otherwise be entitled to the claimed benefits.*" (Petition, p. 6; emphasis in original.) Having created this "strawman" holding, petitioners go on to attack it on the basis that it conflicts with decisions of other circuits that a procedural violation of ERISA gives rise to a cause of action only if it causes economic injury to the employee. (Petition, p. 7.) Petitioners' analysis, however, fails on three counts: (i) it ignores the court's justifiable holding that, under the express terms of the plan, respondents *are* entitled to benefits; (ii) it misconstrues the record by assuming that respondents did not suffer any injury where, in fact, the record is replete with evidence that respondents were harmed; and (iii) it artfully ignores the gross nature of Del Monte's violations of ERISA.

Although a reading of the petition alone would suggest otherwise, the analysis of the Ninth Circuit resulting in the determination that respondents are entitled to severance pay does not begin and end with the finding that Del Monte violated ERISA. Rather, after concluding that "the type of plan administration practiced by Del Monte is highly probative of whether a particular decision to deny benefits . . ." was arbitrary and capricious and that "this factor weighs heavily against Del Monte," (Petition, pp. A-28-29), the court goes on to carefully scrutinize the terms contained

in the plan and holds that Del Monte's interepretation cannot be sustained under ERISA because it "imposed several standards not required by the severance policy." (Petition, p. A-29.)

As the court observed, the plan provides for severance pay when "jobs are 'eliminated' "[11] and "alternative *employment opportunities are unavailable within the Corporation.*" (Petition, p. A-29; emphasis court's.) Nothing in this, or any other language in the plan, says anything about unemployment. (Petition, p. A-29, n.2.) Further, the policy excepts only three specific classes of employees from eligibility (*ibid.*), none of which include employees who are subsequently hired, let alone hired by a company which purchases a subsidiary from Del Monte.[12]

In sum, as the Ninth Circuit found, "[t]he plan does not condition receipt of severance benefits upon elimination of positions from the face of the earth . . . does not condition receipt of benefits upon employees' subsequent employment . . . [and] does not condition receipt of benefits upon failure of a successor corporation to offer jobs after their employment with Del Monte ceases . . . The plan specifies only that the job be 'eliminated' and that alternative Corporation jobs be unavailable." (Petition, p. A-30.) Accordingly, Del Monte's decision was rejected because "*no permissible construction* of 'eliminated' permits us to imply other conditions into the plan, as Del Monte would have us do." (Petition, p. A-30; emphasis added.) Far from ruling that a

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[11] Del Monte asserts that the Ninth Circuit somehow erred in characterizing the Del Monte plan as dependent upon "job" elimination rather than elimination of "employment positions." (Petition. pp. 11-12, n.11.) The tenuous and sophistic distinction to be drawn between a "job" and an "employment position" escapes respondents. At any rate, the plan's intent to benefit employees who lose their jobs (or even "employment positions") *at Del Monte* is made clear by the key phrase, *conveniently omitted from petitioners' argument* (*see* Petition, p. 11) "and for whom appropriate alternative employment opportunities are unavailable *within the Corporation.*"

[12] The third exception to eligibility—employees who refuse transfer to positions "offered to them *by the Corporation*"—reinforces the conclusion that an offer of employment by a *different* employer does not result in a loss of the right to receive severance benefits.

procedural violation entitles the employees to benefits they would not "otherwise be entitled to," the Ninth Circuit found that respondents' right to severance pay was founded upon the plain language of the plan and that the multifold procedural violations precluded modification of the plan by interjection of new and inconsistent conditions, based upon undisclosed interpretations and past practices at other subsidiaries.[13]

Petitioners' further contention that respondents suffered "no injury" by reason of Del Monte's multiple violations of ERISA's reporting and disclosure requirements (Petition, pp. 7-9) is likewise meritless as it is unsupported by either the Court of Appeals' opinion or the record. This so-called "windfall" argument proceeds from the mistaken premise that severance pay is solely intended as a type of unemployment benefit.[14] Of course, that

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[13] The Ninth Circuit's determination that respondents' positions were eliminated as a result of the sale of Granny Goose is supported by numerous other decisions regarding such divestitures. *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (positions within selling company eliminated as a result of a sale of its division as a going concern); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1521 (11th Cir. 1985). (provision providing for severance pay "when company terminates the employer-employee relationship," does not specify "a period of unemployment as a condition precedent to receiving severance pay benefits"); *Livernois v. Warner Lambert Co., Inc.*, 723 F.2d 1148, 1154, n.8 (4th Cir. 1983) (divestiture of division, if it eliminated selling company's liability to employees, "terminated their employment, eliminated their jobs . . ."); *Petrella v. NL Industries*, 529 F. Supp. 1357, 1360 (D.N.J. 1982) (employees of division may have been entitled to severance benefits under employers' practice of paying the same to "every previously terminated employee . . .)"; *Chapin v. Fairchild Camera Etc. Corp.*, 31 Cal. App. 192, 199, 107 Cal. Rptr. 111, 116 (1973) (employment with seller involuntarily terminated.)

[14] ERISA clearly distinguishes between unemployment benefits and severance benefits. Under section 1002(1), an employee welfare benefit plan includes

> "any plan, fund, or program . . . for the purpose of providing . . . (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or *unemployment*, or vacation benefits, apprenticeship or other training programs, or day

premise is inconsistent with the plan's express terms, the court's interpretation of the plan's terms, respondents' perception of the benefits as a form of compensation for past services (ER-426) and even with Del Monte's own interpretations and administration of the plan[15] and characterization of the benefits provided thereunder. (ER-510-511.)

Respondents' belief that severance pay was to be given in recognition of past services is entirely reasonable: other courts have similarly described them. *See, e.g., Petrella v. N.L. Industries,* 529 F. Supp. 1357, 1362 (D.N.J. 1982) (affadavits supported finding that severance benefits provided as a form of "farewell bonus"); *Chapin v. Fairchild Camera Etc. Corp.,* 31 Cal App. 3d 192, 198-199, 107 Cal. Rptr. 111, 116 (1973) (stating that "[s]eparation pay is a kind of accumulated compensation for past services and a material recognition of their past value.")

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care centers, scholarship funds, or prepaid legal services, or (B) *any benefit described in section 186(c) of this title* . . . ." (Emphasis added.)

As the Court of Appeals observed, severance plans fall under ERISA because they are described in section 186(c) (Petition, p. A-25, citing 29 C.F.R. § 2510.3-1(a)(3)), rather than because they are unemployment benefits included in subsection (A) of section 1002(1).

[15] Notably, Mr. Hageman, the person who decided that respondents were not entitled to severance benefits, admitted that if Granny Goose had been closed rather than sold and on the very next day all of the employees obtained a job with a company totally unrelated to Del Monte, they would have received severance pay. (ER-337.) This is hardly consistent with petitioners' assertions that the plan was intended "to tide them [the employees] over during their periods of unemployment" (ER-236) except perhaps "based on Del Monte's secret distinctions and conditions." (Petition, p. A-33.) Moreover, under the "Separation Allowance Policy" the amount of severance pay depends on the length of employment with Del Monte, plainly recognizing the employee's *past services,* rather than the anticipated duration of unemployment. Finally, separation allowances were normally paid in a lump sum (ER-370), and there is no evidence that Del Monte ever inquired into the subsequent employment status of employees given severance pay or, as to employees paid in installments, terminated their benefits if they found a new job.

Viewed in that manner, as respondents did, granting severance benefits is not a windfall, it is an *entitlement.*[16] In fact, to rule that severance benefits were not required where, by the very terms of the plan they are *not* tied to unemployment, would result in windfall to petitioners.

Petitioners's claim that there is no causal link between the damage respondents suffered and Del Monte's flagrant procedural violations is unfounded; in fact, the record shows that the intentional concealment of the plan and its interpretations caused respondents to suffer the *very injury Congress intended to avert in requiring full disclosure.*

> "It is grossly unfair to hold an employee accountable for acts which disqualify him for benefits, *if he had no knowledge of those acts,* or if the conditions were stated in a misleading or incomprehensible manner in plan booklets." H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4646 and 4847; emphasis added.

Here, based on their knowledge of Del Monte's uniform practice of granting severance pay to all previously involuntarily terminated employees of Snacks, respondents fully expected to all receive severance benefits, both before and after learning of the impending sale. (ER-387-388, 476-477, 564.) Further, the conditions which Del Monte would engraft upon its secret plan—"unemployment" and "no offer of employment by the

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[16]In addition, providing severance benefits to respondents does not result in a windfall simply because the new employer offered them jobs, since, contrary to petitioners' assertions, respondents *were* harmed as a result of the sale. Unlike Del Monte, Potato Chips offers no retirees' health insurance, has a pension plan only "in theory" (ER-485) and provides less job security. (ER-565.) Further, the employees who were terminated by Del Monte just short of qualifying for early retirement benefits under the Del Monte Retirement Plan suffered serious financial damage. (ER-212, 416, 478-479.) And even if a windfall did result, the fault would lie solely with petitioners and not the Court of Appeals; petitioners were the ones that concealed their interpretation of the plan and failed to draft it in accordance with that interpretation. *Cf. Richardson v. Cent. States, Southeast & Southwest,* 645 F.2d 660, 663 (8th Cir. 1981).

purchasing corporation"—were not merely stated "in a misleading or incomprehensible manner" but rather were not stated (or even explained) at all. (*Ibid.*) Thus, as a result of Del Monte's fundamental violations of ERISA, respondents were denied any knowledge of the plan's terms and denied any opportunity to participate in the decision process. Under these circumstances, Del Monte's decision cannot be seen as anything other than arbitrary and capricious.

The substantive harm which the Court of Appeals found petitioners' procedural violations could work is hardly "amorphous." (*See* Petition, p. 8.) Because petitioners actively concealed their interpretations of the plan, respondents were misled into believing that they would be given severance pay.[17] To therefore require the payment of benefits, rather than allow the employer to rely on undisclosed conditions and undisclosed practices, is consistent with ERISA and, indeed, with any reasonable notion of justice and does not create a "needless employee

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[17] The injury respondents suffered in being denied severance benefits also resulted from Del Monte's violations of the claims procedures, *i.e.*, its complete failure to establish any. There is no evidence that Mr. Hageman was aware of his fiduciary duties to respondents imposed by ERISA or even that he was a fiduciary. Moreover, *Mr. Hageman made his decision without ever having read the policy* (ER-337-338), much less making written reference to the pertinent plan provisions as required by ERISA (*see* 29 C.F.R. §§ 2560.503-1(f) and (g)) and without considering any evidence or arguments from respondents. (ER-564-565.) Indeed, Mr Hageman flatly admitted, "I didn't use [. . . the Separation Allowance Policy] in making a decision on separation pay." (ER-344.) Whether Mr. Hageman would have reached the same decision had Del Monte adhered to a claims procedure in compliance with ERISA can only be answered, in the Court of Appeals' words, "through the cost-benefit analysis of hindsight." (Petition, p. A-32.) Petitioners' claim that "the denial of benefits results from interpretation of the plan, not from any claimed procedural violations" (Petition, p. 9, n.7) is mere surmise and demonstrates their continued disparagement of the importance specific procedures play in influencing a substantive decision. Surely that is the reason that Congress endeavored to require them under ERISA.

remedy" for an "irrelevant" procedural violation. (*See* Petition, p. 9.)[18]

Nor does the Ninth Circuit's decision create a disincentive for the continuation of voluntary ERISA plans. (*See* Petiton, p. 9.) The opinion, which relates only to the situation in which an employer deliberately flaunts ERISA's procedural requirements, carefully observes that "ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans," (Petition, p. A-28). The court also takes note: "[A] claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy . . . in the ordinary case." (*Ibid.*) But this clearly is not the ordinary case. Hence, the opinion does preclude an employer from denying benefits on the basis of conditions which are concealed from the employees, as well as absent from and inconsistent with the written plan. But since ERISA already requires full reporting and disclosure (§§ 1021-1031) and administration "in accordance with the documents and instruments governing the plan" (§1104(a)(1)(D)), that result creates no more of a disincentive than the statute itself.

In short, rather than creating disincentives to continue voluntary ERISA severance benefit plans, the Ninth Circuit opinion merely instructs employers who would rely on broad deference under the arbitrary and capricious test to do a few simple things:

1. Comply with the law or at least attempt to do so;

2. Disclose, rather than conceal, the plan and any unwritten conditions;

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[18] Other Courts have also found that a remedy for failure to comply with ERISA's disclosure requirements is necessary to preserve "Congress's intent to prevent inequities stemming from employers' failure to apprise employees of the essential provisions of their benefit plans." *Gors v. Venoy Palmer Market,* 578 F. Supp. 365, 368-369 (E.D. Mich. 1984); *Hillis v. Waukesha Title Co.,* 576 F. Supp. 1103, 1107-1110 (E.D. Wis. 1983). Total non-compliance with ERISA and intentional concealment of the plan surely constitute more than an "irrelevant" procedural violation.

3. If it is intended to disqualify employees from benefits, word the plan accordingly; at least, do not provide exactly to the contrary.

Respondents suggest these simple rules do not constitute any novel proposition of law, extraordinary interpretation of ERISA or radical departure from other cases interpreting ERISA, nor do they establish any policy likely to frustrate the legitimate goals of well-meaning employers who in good faith try to comply with the law. Rather, it is the unstated premise underlying petitioners' argument that is radical. They, in essence, would have this Court hold that there is an invariable *substantive* requirement under ERISA mandating that no separation benefits are allowable upon the sale of a subsidiary where the employees remain employed with the purchaser, *regardless* of the wording of the plan and regardless of the conduct of the employer.

II

THE NINTH CIRCUIT'S DECISION THAT RESPONDENTS ARE ENTITLED TO SEVERANCE BENEFITS DOES NOT CONFLICT WITH THE *SLY* OR *ANDERSON* CASES

Petitioners assert that certiorari should be granted because the Ninth Circuit's decision in *Blau* purportedly conflicts with the decisions of two other circuits—*Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir. 1985) and *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983). But comparison of the cases reveals only that they are accordant on the law and distinguishable on the facts. Thus, any further review by the Court is unnecessary.

First, petitioners suggest that a conflict exists because the Ninth Circuit held as a general proposition that severance benefits are payable when a business is sold and the employees are retained by the purchaser. (*See* Petition, p. 5.) The decision, however, makes no such statement and is confined to the plan and facts at issue. This is clearly demonstrated by *Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985), decided only one week later, wherein the court held that under the plan and facts there at

issue, the employees were *not* entitled to severance pay when the division they worked for was sold and they were hired by the purchaser.

Next, petitioners assert that *Blau* somehow conflicts with *Anderson's* holding that the arbitrary and capricious standard of review pertains, notwithstanding the employee's procedural violations in an ERISA plan's management. (Petition, p. 7.) Of course, *Anderson* expressly observes that the Ninth Circuit applied that same test. 759 F.2d at p. 1521. *(See* Petition, p. A-26.) Nor is the application of that test any different. *Anderson,* like *Blau,* acknowledges that the employer's good faith in interpreting the plan is a component of the arbitrary and capricious test. 759 F.2d at p. 1522. In *Anderson,* however, the person who interpreted the plan "did nothing that could be characterized as having been done in bad faith." *Ibid.* In contrast, the evidence of petitioners' bad faith in interpreting the plan was overwhelming. (*Infra,* p. 23.)

Further, *Anderson* and *Blau* are distinguishable because, as the *Anderson* court correctly points out, the plans in the two cases are distinguishable. 759 F.2d at p. 1523. The plan at issue in *Anderson* contained an express "special situation" provision which made the policy inapplicable where the employer "deemed[ed] it necessary to establish a separate policy applicable to that situation only." *Id.*, at p. 1520. Significantly, this provision *had* been disclosed to the employees as it was contained in their employee handbooks.[19] Thus, in light of the broad discretion the "special

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[19] Del Monte notes that the plan documents reviewed in *Anderson* did not specifically state that termination of an employee who went to work at a purchasing company was a circumstance that might result in denial of benefits. (Petition, p. 7, citing 759 F.2d at p. 1521.) But, as distinguished from the case at bar, a summary of the plan had been distributed to the employees and it included the provision the employer relied on in denying benefits. Thus, it would have been reasonable for the court to conclude that although the employer violated ERISA, it had still acted in good faith and that the employees were nonetheless on notice that severance benefits would not be paid. *(Ibid.)* Petitioners' utter disregard for ERISA, including a conscious decision to exclude any description of the plan from the employee handbook (ER-374-376),

situation" provision plainly granted the administrator, the court justifiably concluded that the denial of benefits in that case was not arbitrary and capricious. 759 F.2d at p. 1522. But in this case, the policy contains no provision even remotely similar to that at issue in *Anderson,* much less one that was disclosed.

The Ninth Circuit's construction of the Del Monte plan is actually bolstered by *Anderson.* The employer in *Anderson* alternatively sought to support its decision to deny severance pay on the ground that it had not "terminated the employer-employee relationship" as required by the policy for entitlement to benefits. 759 F.2d at p. 1521. The court rejected that justification, holding that because "the plan never specified a period of unemployment as a condition precedent to receiving severance pay benefits . . . [p]laintiffs were 'terminated' for severance pay purposes." *Ibid.,* citing *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1354-55 (9th Cir. 1984). Thus, *only* the interpretation based on the "special situation" provision was affirmed.

The *Sly* case is also distinguishable. There, the court, relying on language in the policy stating it was "intended to cover separation caused by reduction in force or position elimination . . . ." (712 F.2d at p. 1212) concurred in the district court's observation that "positions were eliminated within Mallory due to the sale of the Metallurgical Division . . . ." *Id., at* p. 1211; emphasis added. This, of course, is consistent with *Blau.* But, unlike the Del Monte policy, the policy reviewed in *Sly* did *not* contain the key conjunctive phrase "and for whom appropriate alternative employment opportunities are unavailable *within the Corporation.*" (Emphasis added.) Accordingly, the court determined that the policy was meant to apply only to unemployed persons based on other provisions and "read as a whole . . . ." *Ibid.*

In contrast to the policy reviewed in *Sly,* the "other provisions" of Del Monte's severance plan reinforce the conclusion that severance benefits are not tied to unemployment. Specifically, none of the eligibility limitations in the Del Monte plan refer to

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cannot similarly be considered a technical or good faith violation, and, in intentionally concealing the entire plan, they failed to place respondents on notice of *any* basis for denying severance benefits.

unemployment. Moreover, the reference to positions "within the Corporation" in both the "Objective" and "Eligibility" sections confirms that the right to severance pay turns on the employee's loss of a position at *Del Monte,* rather than the complete loss of work. (*Infra,* pp. 5-6 and 12; *see* Petition, pp. A29-30, n.2.)

In sum, the *Sly* court, like the Ninth Circuit in *Blau,* looked to the plan to determine its intent. The Seventh Circuit found in the provisions of the plan before it an intent that benefits be paid only in the event of unemployment. The *Blau* court, interpreting different provisions, correctly determined that the Del Monte plan not only lacked such a condition but provided to the contrary. This difference in interpretation of different documents hardly seems worthy of Supreme Court review.[20]

III

THE NINTH CIRCUIT APPLIED THE ARBITRARY AND CAPRICIOUS TEST IN A MANNER CONSISTENT WITH THAT OF OTHER COURTS

Petitioners do not contest the Court of Appeals' statement of settled law that an administrator's decision with respect to an ERISA plan may be reversed if it is "arbitrary, capricious, made in bad faith, not supported by substantial evidence or erroneous on a question of law." (Petition, p. A-26.) Rather, they contend that the court "redefined" the test by holding that the plan administrator acts arbitrarily and capriciously if it applies an

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[20] Evidently the *Sly* court was not called upon to evaluate the ramifications of the employer's apparent procedural violations of ERISA, for it certainly did not address the issue. Since the decision is silent on the point, it can hardly be said to conflict with the Ninth Circuit's opinion in *Blau.* At any rate, *Sly* acknowledges that the administrator's decision can be reversed under the arbitrary and capricious test if it is in bad faith (712 F.2d at p. 1211) but found that the plan had been administered in good faith. *Id.,* at p. 1213. However, as indicated by the Ninth Circuit, "Del Monte's administration, in contrast, was characterized by so many ERISA violations that it is impossible to hold, as a matter of law, that the administration was not arbitrary and capricious." (Petition, p. A-29, n.1.)

"interpretation" not required by the plan. (Petition, p. 10.) But again, petitioners misstate the Court of Appeals' opinion, which held, in essence, that since Del Monte had not complied with ERISA in any respect, and, since the plan's express terms provided for benefits, the employer could not interject different and secret *conditions* unless required by the language of the plan itself. As explained below, the Ninth Circuit's holding that such flagrant violations of ERISA precluded affirming Del Monte's decision to deny benefits under the arbitrary and capricious test is fully consistent with the decisions of courts in other circuits which have applied that standard of review.

The court first ruled that Del Monte's decision to deny benefits could not survive even the deferential arbitrary and capricious standard because "it was made in the course of, and could have been infected by, these ERISA violations." (Petition, p. A-27.) This ruling flows from the same conclusion reached by many courts, namely, that "in reviewing an administrator's decision, the court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary or capricious." (Petition, p. A-28.)[21] Indeed, numerous cases have held a trustee's decision insufficient to satisfy the arbitrary and capricious test due to a procedural violation.[22]

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[21] The court alternatively stated its ruling: "[w]e hold that the type of plan administration practiced by Del Monte is highly probative of whether its decision to deny benefits was infected by having been made in conformity with the objectionable scheme." (Petition, pp. A28-29.)

[22] *See, e.g., Toland v. McCarthy,* 499 F. Supp. 1183, 1190 (Mass. D. 1980) (trustee rendered decision without developing or considering reasonably available evidence bearing on employee's claim); *Wolfe v. J.C. Penny Co., Inc.,* 710 F.2d 388, 393 (7th Cir. 1983) (trustee failed to give reason for denial or inform employee of information necessary to perfect claim or of means to appeal); *Richardson v. Cent. States, Southeast & Southwest,* 645 F.2d 660, 665 (8th Cir. 1981) (trustee failed to give supporting rationale for decision in opinion form); *Grossmuller v. Budd Co. Consol. Retirement, Etc.,* 547 F. Supp. 111, 114-116 (S.D. Pa. 1980), *modified* 715 F.2d 853 (employee not informed of accusations or evidence underlying decision or opportunity to rebut same).

Petitioners assert that the Ninth Circuit's reliance on blatant violations of ERISA as a basis for holding that Del Monte's decision did not satisfy the arbitrary and capricious test somehow conflicts with the Eleventh Circuit's statement of law in *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518, 1522 (11th Cir. 1985) that the issue under the arbitrary and capricious test is whether the "interpretation was made rationally and in good faith." (*See* Petition, p. 9.) But the *Blau* and *Anderson* decisions are entirely harmonious—Del Monte's procedural violations provided overwhelming evidence of its bad faith in "interpreting" the plan.

The Del Monte "administrator" based his unwritten decision to deny benefits on an undisclosed, unwritten interpretation of a policy intentionally concealed from the employees, without even bothering to read it. Moreover, despite their obvious awareness of the employees' concerns regarding severance pay (ER-355-356), petitioners never took the trouble to announce that decision (ER-563), much less provide the employees any avenue of redress. (ER-564.)[23]

Del Monte's decision to deny benefits was also ruled arbitrary and capricious, because it "imposed several standards not required by the severance policy." (Petition, p. A-20.) This application of the arbitrary and capricious test is also consistent with that

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[23] Petitioners contend that all this is insufficient to show their bad faith because the "question focuses on the evenhandedness of the employer's action," which is allegedly demonstrated here by their consistent past practice. (Petition, p 12.) The contention is easily disposed of: evenhandedness of treatment is not the *only* factor relevant to the issue of bad faith. *Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314-315 (5th Cir. 1982), specifically cited for this point in *Anderson*, identifies *several* pertinent factors including the "factual background of the determination by a plan and inferences of lack of good faith, if any" and proceeds to state, "[w]hile it is true that differentiated treatment could be indicative of arbitrary and capricious action, the opposite proposition, that uniformity establishes the absence of arbitrary and capricious conduct, is not necessarily true." Simply put, arbitrary and capricious conduct does not become reasonable simply by being repeated. *C.f. Morgan v. Mullins*, 643 F.2d 1320, 1324, n.4. (8th Cir. 1981).

of the other circuits. *Maness v. Williams,* 513 F.2d 1264, 1267 (8th Cir. 1975) (imposing standard not required by plan "would result in unwarranted arbitrary construction of plan); *accord Morgan v. Mullins,* 643 F.2d 1320, 1321 (8th Cir. 1981); *Dennard v. Richards Group, Inc.,* 681 F.2d 306, 314 (5th Cir. 1982); *Miles v. New York State Teamsters Conference, Etc.,* 698 F.2d 593, 599 (2d Cir. 1983), *cert. den.* ____ U.S. ____, 104 S. Ct. 105 (1984); *Ganze v. Dart Industries, Inc.,* 741 F.2d 790, 793 (5th Cir. 1984); *see also Snackard v. Commission House Drivers Union,* 647 F.2d 721, 713 (6th Cir. 1981) (trustee violated ERISA by adding rule where plan silent on question.) Indeed, to hold that the arbitrary and capricious test affords an employer-administrator such broad discretion that it can impose eligibiltiy conditions without any foundation in the language of the plan would conflict with the statutory requirement that a fiduciary must discharge his duties "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D).

Furthermore, the Ninth Circuit's opinion does not deprive the administrator of the discretion to make *reasonable* interpretations of the plan. The court's discussion makes it clear that Del Monte's interpretation was *not* reasonable; *first,* because the interpretation was contrary to the language of the plan itself and, *second,* because neither the plan's interpretation and the secret intent underlying that interpretation were ever discosed to respondents. Thus, the court stated, "*[n]o permissible construction* of 'eliminated' permits us to imply other conditions into the plan, as Del Monte would have us do." (Petition, p. A-30; emphasis added.) Indeed, respondents submit that to read in additional conditions to eligibility expressed nowhere in plan language would *a fortiori* constitute an unreasonable interpretation.[24]

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[24] Notably, ERISA requires disclosure of "the plan's requirements respecting eligibility for participation and benefits . . . [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits . . . ." 29 U.S.C. § 1022(b). To impose eligibility requirements which are not disclosed would deprive this statute of any significance.

Finally, the Ninth Circuit's refusal to interpret the plan with reference to Del Monte's secret intent and undisclosed past practices, of which respondents were not aware, is completely consistent with the case law interpreting ERISA.[25] More significantly, that ruling is essential to preserve the congressional intent underlying the ERISA disclosure requirements "to prevent . . . the inequities that stem from a plan administrator's failure to apprise participants of the essential provisions of their benefit plans . . . ." *Hillis v. Waukesha Title Co., Inc., supra,* at pp. 1103, 1107; *see also* H. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted* in 1974 U.S. Code Cong. & Admin. News 4639, 4646 and 4649; *Wadsworth v. Whaland,* 563 F.2d 70, 73-74 (1st Cir. 1977).

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[25] *See e.g., Morgan v. Mullins,* 643 F.2d 1320, 1324, n.4 (8th Cir. 1981) (trustee's consistent interpretation not controlling where documents explaining requirements to employees did not discuss interpretations); *Petrella v. NL Industries,* 529 F. Supp. 1357, 1362 (D.N.J. 1982) (employees guaranteed employment by company purchasing division may have been entitled to severance benefits where all previously terminated employees granted severance benefits "as a form of farewell bonus" notwithstanding internal policy statement that severance pay was to provide employees financial resources while unemployed); *Hillis v. Waukesha Title Co.,* 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) (holding forfeiture clause cannot be enforced against plan participant who is reasonably unaware of clause where plan administrator fails to take steps to advise participant of clause); *Palino v. Casey,* 664 F.2d 854, 859 (1st Cir. 1981) (trustees subject to limits of fundamental fairness, which are exceeded when eligibility rules changed without notice); *Valle v. Joint Plumbing Industry Bd.,* 623 F.2d 196, 203 (2d Cir. 1980) (extent to which trustee has notified employee of changes in rules is factor in determining whether application of new eligibility requirement was arbitrary and capricious.) To the extent the Ninth Circuit's opinion might be read to suggest that an employer's interpretation of a plan should be subject to closer scrutiny by the reviewing court under the arbitrary and capricious test where the decision is made in the course of plan administration in total violation of ERISA, it is also consistent with existing case law. *See Maggard v. O'Connell,* 671 F.2d 568, 571-573 (D.C. Cir. 1982).

CONCLUSION

Under *Blau*, the Ninth Circuit will, like other circuits, continue to defer to an employer's reasonable interpretation of the terms and conditions of an ERISA plan which have been disclosed to the employees. The *Blau* decision merely stands for the proposition that, in applying the arbitrary and capricious standard, courts need not also defer to an employer's undisclosed interpretation based on an undisclosed purpose, which is contrary to the language of the plan, where the employer conceals the plan and defies ERISA. No principle of law requires any other result. Accordingly, respondents respectfully submit that the petition for a writ of certiorari should be denied.

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